Supreme Court, U.S.
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No. 00-0289

IN THE
SUPREME COURT OF THE UNITED STATES

Yarnell, J.T. etc., et al.,

Petitioners

v.

Cuffley, Michael, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENTS

STATEMENT

Petitioners disregard the specific factual basis for the decision below, which is wholly independent of the constitutional issues they raise.

The Court of Appeals held that "the undisputed facts conclusively demonstrate that [Missouri] unconstitutionally denied the Klan's application based on the Klan's views." Petition, p.4a. The Eighth Circuit found as a factual matter that the Missouri nondiscrimination justification is "obviously unreasonable and pretextual", *Id.*, because the regulations were selectively targeted to the Klan and not applied to other similarly situated program participants. *Id.* Resolution of the constitutionality of Missouri's asserted nondiscrimination justification is unnecessary to the decision of the case. Petitioners' petition is nothing more than a request for an advisory opinion.

MISSOURI ADMITS THAT IT TREATED THE KLAN'S APPLICATION DIFFERENTLY BECAUSE IT DISLIKES THE KLAN'S BELIEFS

Missouri asserts the right to exclude an applicant on the basis of its beliefs. Petition, pp. 6a-7a. Missouri candidly admits that the Klan's application was treated differently from the vast majority of applications, Petition p. 5a, and that this disparate treatment is a direct result of Missouri's "perception of the Klan's beliefs." Petition, p. 6a.

MISSOURI'S PURPORTED NONDISCRIMINATION REGULATIONS ARE NOT APPLIED TO ANY OTHER PROGRAM PARTICIPANTS AND ARE THEREFORE, PRETEXTUAL

Missouri alleges that its exclusion of the Klan is justified by the Klan's discriminatory membership policies. Missouri adopted its nondiscrimination regulation in 1995, one year after the Klan applied to the program, to wit: "Applicants must adhere to the restrictions of all state and federal nondiscrimination laws. Specifically, the applicant must not discriminate on the basis of race, religion, color, national origin or disability. Such discrimination disqualifies the applicant." Petition, p.9a. Missouri also cites Executive Order 94-03, Petition, p. 15a and Title VI of the Civil Rights Act of 1964, Petition, p. 13a, as additional motivations for excluding the Klan on the basis of its discriminatory membership policies.

Missouri cannot identify any state or federal nondiscrimination law allegedly violated by the Klan. Missouri concedes that it does not require any other applicant to disclose its membership requirements and that it makes no effort to investigate any other applicant's membership requirements. Petition, p. 16a. Missouri has never denied any other applicant on the basis of discriminatory membership criteria, even though many of the participants currently discriminate in one or more of the prohibited basis, *e.g.*, the Knights of Columbus (sex and religion), the Catholic Church (religion), and the Boy Scouts (sex). Petition, pp.16a, 26a. The Eighth Circuit concluded as a factual matter that Missouri's asserted nondiscrimination "reasons are entirely pretextual." Petition, p. 15a.[1]

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[1]Although it was unnecessary to resolution of the appeal, the Eighth Circuit also held that Missouri's attempt to dictate membership policies to the Klan as a condition of participation in the Adopt-A-Highway

REASONS FOR DENYING THE PETITION

This Court has always followed a policy of strict necessity in reaching constitutional issues. *Rescue Army v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 569, 67 S.Ct. 1409, 1419 (U.S.Cal. 1947). Missouri's Petition rests on the wrongheaded supposition that the Eighth Circuit decided the case solely on a narrow question of law relating to the so-called nondiscrimination provisions. The Court below rejected Missouri's reliance on the purported nondiscrimination reasons as pretextual because Missouri exclusively applied these nondiscrimination provisions to the Klan and not to other similarly situated program participants. The explicit finding that Missouri's nondiscrimination justification is pretextual obviates the need to reach the constitutionality of the asserted justification. The constitutional implications of Missouri's purported nondiscrimination regulations simply do not matter when Missouri either failed to enforce them at all or exercised them in an egregiously discriminatory manner designed to punish the Klan for its exercise of First Amendment freedoms.

Petitioners statement that the "Eighth Circuit's conclusion regarding pretext was based principally on its belief that

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program is a violation of the Klan's First Amendment freedom of association. "The State simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association." Petition, p. 12a.

Furthermore, if Missouri has any constitutional claims that survive the Eighth Circuit's findings of pretext, they are completely disposed of by this Court's recent holding in *Boy Scouts of America, et.al v. Dale*, 530 U.S. ___(2000), which rejected attempts by the State to interfere with expressive association by dictating an association's membership requirements. *See*, the Eighth Circuit's finding that "[t]here seems to be little question that requiring the Klan to accept non-'Aryans' would significantly interfere with the Klan's message of racial superiority and segregation." Petition, p. 10a.

there was no 'convincing and constitutional' reason for the denial", Petition, p. 11 (emphasis added), implicitly acknowledges that the Court below relied on findings other than constitutional dissection of their asserted nondiscrimination provisions. Petitioners completely disregard the "non-principal" basis for the Eighth Circuit's ruling; that Missouri's nondiscrimination justification is trumped-up.

Petitioners do not challenge the Eighth Circuit's holding that government may not posit its grace on the relinquishment of constitutionally protected freedoms of speech and association. *Rutan v. Republican Party*, 497 U.S. 62, 67 (1990), citing *Perry v. Sinderman*, 408 U.S. 593, 596-8 (1972). The Eighth Circuit's ruling that Missouri is prohibited from excluding the Klan from the Adopt-A-Highway program in retaliation for its exercise of First Amendment freedoms is a correct application of law to the facts and not in conflict with any other court. Such ruling is wholly independent of the constitutional issues raised by Missouri's petition.

CONCLUSION

Petitioners advance the insidious, but seductive, notion that participation in government programs should be closed to those who are at odds with the prevailing political orthodoxy. The First Amendment has always been the last defense against those who would misuse government power to suppress political dissidents. Petitioners' characterization of these constitutional limitations upon the State of Missouri as "bizarre" and "shocking" serves as a reminder of the eternal need for vigilance in the protection of our constitutional freedoms

This Court should deny petitioners' writ.

Respectfully submitted,

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